Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

No. 74-220

In the Supreme Court of the United States

OCTOBER TERM, 1974

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

---

1. Petitioner, Commonwealth of Kentucky, seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit in this case. That judgment holds that Section 118 of the Clean Air Act of 1970, 84 Stat. 1678, 1689, as renumbered and amended, 42 U.S.C. 1857f, does not require federal officers to obtain emission control permits from the Kentucky Air Pollution Control Commission as a prerequisite to operating federal facilities in Kentucky.

The relevant facts and issues are accurately stated in the opinions of the district court (Pet. App. A) and the court of appeals (Pet. App. B) and may be summarized as follows: Kentucky filed suit in the United States

District Court for the Western District of Kentucky seeking declaratory and injunctive relief against certain officers of the United States responsible for operating various federal installations within Kentucky. The complaint alleged that a Kentucky air pollution regulation required all operators of potential air emission sources to obtain permits from the Kentucky Air Pollution Control Commission, that Section 118 of the Clean Air Act of 1970 made this requirement applicable to the federal defendants, and that the federal defendants had neither applied for nor obtained such permits.

After submission of the case on cross-motions for summary judgment, the district court held in favor of respondents. On appeal, the court of appeals affirmed. It held that Section 118 of the Clean Air Act of 1970 requires substantive compliance by non-exempt federal facilities with state clean air standards but does not subject federal facilities to state permit requirements. The court also compared Section 118 to Section 304(a) permitting citizens' suits against the United States and concluded that the state's suit against the United States was also barred by sovereign immunity and the Supremacy Clause of the Constitution (Pet. App. B 33a-34a).

2. In our view the decision of the Sixth Circuit is correct. However, in an essentially similar suit, the United States Court of Appeals for the Fifth Circuit, in *State of Alabama* v. *Seeber*, 502 F. 2d 1238, has subsequently held that federal installations are indeed subject to state permit requirements and has expressly disagreed with both aspects of the Sixth Circuit's holding in the present case.[1] The federal parties in that case are filing

[1]The same basic issue is presently pending in *California* v. *Stastny*, No. 72-2905, C.A. 9, appeal docketed November 6, 1972; *Illinois* v. *Department of Defense*, N.D. Ill., Civ. No. 74-C-3122 (Joliet Arsenal air case); *United States* v. *Pennsylvania Environmental Hearing Board*, M.D. Pa., Civ. No. 73-454; and *Chattanooga-Hamilton County Air Pollution Control Board* v. *ICI-Atlas*, E.D. Tenn., Civ. No. 6581 (Volunteer Arsenal air case).

a petition for a writ of certiorari seeking review of that decision.[2] We accordingly do not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

[2]We are furnishing a copy of our petition in that case to the petitioner here.